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CURRENT TOPICS.

In a recent case in Pennsylvania—*Wayne County v. Waller*, 7 W. N. 377, an attorney having been appointed by the court to defend a pauper prisoner sought to recover from the county compensation for his professional services, and for expenses incurred in preparing for trial. The Supreme Court held that the defendants were not liable. "In this State" said STERRETT, J., "we have always proceeded on the safe principle of requiring statutory authority—either in express terms or by necessary implication—for all such claims upon the public treasury. To hold that counsel appointed to defend insolvent prisoners may demand compensation from the county would be a departure from a time honored custom to the contrary, and it is not difficult to foresee the mischief to which it would lead. It is far better to let such cases rest on the foundation which has hitherto sustained them—human sympathy and a just sense of professional obligation. No poverty stricken prisoner is ever likely to suffer for want of necessary professional or pecuniary aid. It is but simple justice to the learned gentleman who brought this suit to say that, in their brief as well as orally, they disclaim any desire for remuneration beyond an amount sufficient to reimburse them for their actual cash outlay, but we find no warrant for sustaining their claim even to this extent." In Rowe v. Yuba County, 17 Cal. 63, it was said: "We are clear that the action can not be maintained. The court of quarter sessions is not authorized to create any charge against the county except in certain special cases of which the employment of counsel for parties under indictment is not one. Besides it is a part of the general duty of counsel to render their professional services to persons accused of crime who are destitute of means, upon the appointment of the court, when not inconsistent with their obligations to others and for compensation they must trust to the future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenceless because no provision for their compensation is made by law." To the same effect is Vise v. County of Hamilton, 19 Ill, 78, in which it is said: "The law confers on licensed attorneys rights and privileges, and with them imposes obligations which must be reciprocally enjoyed and performed. The plaintiffs but performed an official duty for which no compensation is provided." An opposite view has been taken in other States. In Hall v. Washington County, 2 G. Greene, 437 it was held that inasmuch as the Constitution of Iowa guaranteed to the prisoner a speedy trial and "the assistance of counsel for his defense," and as the court acted in obedience to the express mandate of a statute in assigning counsel, and the latter, as an officer of the court, was bound to serve—an obligation arose to pay a reasonable compensation for the services thus rendered, and consequently the county was liable. In County of Dane v. Smith, 13 Wis, 585, a somewhat similar conclusion was reached, the court remarking that the liability of the county resulted from the exercise of the power and duty of the court to appoint counsel, not because the court was authorized to contract for the county or its officers.

In *Ware v. Railroad Company*, lately decided by the Supreme Court of Maine, a judgment was recovered against the defendants as trustees. An execution was issued and placed in the hands of an officer, who made a demand on defendants to pay over and deliver to him "any goods, effects, and credits" belonging to one G, which they neglected and refused to do. The judgment creditor afterwards duly assigned in writing the judgment to this plaintiff. The defendants demurred. It was held that *scire facias* on a judgment might be maintained by an assignee; that it was a chose in action within the statute of that State of March 3, 1874, providing that "assignees of choses in action not negotiable, assigned in writing, are hereby authorized to bring and maintain actions in their own name." It is said in Jacobs' Law Dictionary title "Chose" that generally all causes of suit for any debt, duty, or wrong are to be accounted choses in action. In case

of the death of the plaintiff in the original action, *scire facias* against the trustee must be in the name of the executor or administrator. In Winter v. Kretchmar, 2 D. & E. 45, it was held that the assignees in bankruptcy might bring *scire facias* to revive a judgment. "I can not" observes Ashhurst, J., "distinguish between a *scire facias* and an action brought by the assignees of a bankrupt." "It has been held in a variety of cases," remarks Buller, J., "that *scire facias* is an action." In delivering the opinion of the court in Ensworth v. Davenport, 9 Conn. 392, Williams, J., says: "A *scire facias* is a judicial writ; but still it is an action." Fenner v. Evans, 1 T. R. 268. It may be pleaded to as an action. Grey v. Jones, 2 Wils. 251; Pultney v. Townson, 2 H. Bl. 1227; 2 Tidd, 1046. It may be released by a release of all actions. Co. Litt. 290. "Every *scire facias* is a new and independent action, referring to the former proceedings, but wholly distinct from them." Greenway v. Dare, 1 Halst. (N. J.) 305. In Murphy v. Cochran, 1 Hill (N. Y.), 339, a judgment was held to be a chose in action, and that assignees, under a statute authorizing them to bring actions in their own names, might sue out *scire facias quare executionem non*, to revive the judgment. But reliance was placed on the distinction taken in Adams v. Rowe, 11 Me. 89, that in trustee process *scire facias* against the trustee is not so much a new action as a continuation of the original suit, when it is used to carry into effect a former judgment against a party to it. But the court said: "It is conceded that *scire facias* against bail or indorsers on the writ would be new actions. But while it may be conceded that, in the trustee process, *scire facias* may well be considered in one view as a continuation of the original suit, yet it is difficult to see why it is not a new process, by which a new and different judgment is obtained against a defendant as principal who in the former one was merely a trustee. The judgment in the second action differs from that obtained in the first, and the same is true of the execution issuing thereon."

SUGGESTIONS UPON CODE PROCEDURE AND CODE REVISION.

VI. APPELLATE PROCEEDINGS.—Continued.

But it is said that it is necessary that these causes shall be more specifically assigned so that the appellate court may readily refer to the particular error complained of or the particular cause assigned, as the same is found in the record. But this argument is quite untenable for this reason. The universal rule in all appellate courts is that the brief of counsel shall designate the points relied upon specifically and refer to them by page and line, and an omission to do this is a waiver of the alleged error. And it is not sufficient simply to say the court wrongfully refused a new trial, the particular meritorious cause which was assigned and relied upon must be pointed out, and the foundation for it in the record must be shown by reference. For as to whatever relates to alleged errors which are reached by a motion for a new trial, it requires both the written causes and the assignment of errors to make a full assignment according to former precedents. So that this extraordinary technical particularity has really no necessity and no justification, and ought to be mitigated. And there is no reason why specific errors made grounds for a new trial should not be separately assigned and considered.

2. The amalgation of law and equity as we have seen resulted in adopting the chancery appeal with most of the features of the writ of error at law combined, constituting a mongrel practice conforming in some respects to both and in others to neither. It therefore seemed necessary to embrace in the system the bringing into the record of the case for review the whole evidence as in the chancery appeal, in all cases where the appeal is prosecuted to test any question arising upon the trial of the issues of fact, the method of thus placing the evidence in the record being by bill of exceptions. This is not usually a code requirement, but in the course of practice in many of the code States, notably in Indiana it has become almost an absolute necessity to have the whole of the evidence incorporated into the record by bill of exceptions in order to raise any question upon any ruling occurring at the trial, whether in the instructions given or refused, the admission or exclusion of evidence, or any other

like error. The appellate court always presumes that the trial court has ruled correctly until the contrary appears, and unless the error is one which could not possibly under any supposable state of the evidence be justified, the court will not reverse the case, though the same may seem to have been wrongly decided, unless the whole of the evidence be in the record. This line of rulings is absolutely necessary in a single class of cases, and only one. Although the universality of the rulings may have grown out of the supposed analogy of code appeal to the chancery appeal, this analogy is very slight, for it is observable that the methods under the code appeal are those of the writ of error at the common law, and not those of the appeal in chancery. The class of cases in which alone there is a necessity for the whole of the evidence is where the error of the court in overruling the motion for a new trial, based upon the insufficiency of the evidence, is relied upon for a reversal of the case in the appellate court. Here the appellate court can only judge of the sufficiency of the evidence by reading it all, and hence it should be set out in full.

But while this is so, this class forms only a very small portion of the causes appealed to test questions arising upon the trial. The result is that in a majority of cases thus appealed the record is unnecessarily and improperly incumbered with large masses of testimony which serve no valuable purpose, but greatly increase the labor of counsel in preparing the bill of exceptions, increase the bulk of the record and the cost of the transcript, and while this great bulk of testimony serves no valuable purpose, it does render the record large and unwieldy and obscures the real point presented, by diffusing over a great number of pages of only written matter, that which might be so condensed as to present the only point relied upon, promptly, readily and easily. And with such a bulky record imperfectly presented upon brief, the appellate court spends days in examination of the record, when hours should suffice. The unnecessary increase of labor on this account is enormous as every practitioner knows.

This being so, is there any remedy? We have intimated above that this rule was the growth of judicial construction, but it is perhaps only fair to say that by implication at least, there is legislative sanction for it. But whatever its origin, the only sure and effective remedy for it is legislative modification. But inasmuch as it is conceded that it is necessary in one class of cases, how shall the exemption be preserved and yet the reform be accomplished is freely conceded to be a difficult question. Nor can it be reduced to the same uniformity which is found in the practice in the Federal Supreme Court, for there this exception does not prevail, as rulings upon a motion for a new trial are not assignable for error in that court. But there can be a great reform effected even with this exception standing.

This amendment is suggested as meeting the case and obviating the difficulty. Let it be enacted that in the preparation of a bill of exceptions the judge shall require counsel to introduce no more of the evidence than is necessary to present the question of law upon which the opinion of the appellate court is sought, and no bill of exceptions containing the whole of the evidence shall be signed by any judge, except in cases where a motion for a new trial for the insufficiency of the evidence has been overruled, and where the bill of exceptions containing the whole of the evidence is accompanied by the affidavit of the appellant setting forth that he believes he has a meritorious cause for reversal for error of the court in overruling such motion for such cause, and where such affidavit or the contents thereof are certified to by counsel. This without the exception is the rule of the Federal Supreme Court rigidly enforced. And if this rule with the exception were adopted in code practice, it would greatly mitigate the evil complained of.

For as the appellate court never reverses upon the evidence where there is any substantial basis for the verdict, even though a conflict of evidence appears, only a limited number of cases are taken up with a view to a reversal upon the evidence. And where that is not the ground, the reform would commend its self for its saving of expense and labor, besides other reasons already alluded to.

We can not better conclude this article than by an illustration, showing the effect of the proposed change. Let it be supposed that the action is by a party injured, for an injury occurring at the crossing of a street in a city,

by the collision of a railroad train with a wagon and team, whereby they were destroyed and the plaintiff injured in his person, by alleged negligence of the servants of the defendant, a railroad corporation. The defense is a denial of the negligence, and the charge of contributory negligence by the plaintiff. Twenty-four persons witnessed the collision all of whom are made witnesses, twelve on a side. The whole of the testimony is taken down by a reporter, and makes a hundred pages of written matter, and including the instructions makes a bill of exceptions of large dimensions which, with the pleadings and other matters, will make a large sized record. The plaintiff's witnesses swear that the train was running at twelve miles an hour, which we will concede was a dangerous speed; that no bell was rung or other signal given. But the defendant's witnesses swear that the bell was rung all the way, and the usual signal given and the train conducted in a careful manner, running only four miles an hour. Instructions are asked and refused, and given and refused and excepted to, etc. No appellate court would reverse the case upon the evidence, whether the plaintiff or defendant prevailed, as the evidence is about equally balanced, and even the court below should hesitate to disturb the verdict. But let it be supposed that t e plaintiff had a verdict, as he surely would have in such a case, but the defendant feeling himself aggrieved should desire to test the correctness of the rulings of the court in the instructions. Under the present system he must incur the labor of preparing the bill of exceptions setting out the whole evidence and the instructions, the expense of copying it and the additional labor of digesting, abstracting and presenting it to the court, and must impose upon the court the additional labor of examining this mass of testimony in order to apply to it the instructions, and to test their legal accuracy. But by the proposed reformed method the whole bill of exceptions might be embraced within less than one-twentieth the space, so that nineteen-twentieths of the labor and expense would be thus saved. The bill of exceptions would be about in the following form, that is to say; *Title. Term.* "Be it remembered that upon the trial of the cause aforesaid, at the term aforesaid, the plaintiff's evidence tended to show that the defendant's train was, on the day of the collision mentioned in the complaint, run at twelve miles per hour through the streets of A. from its depot toward B. That no bell was rung and no whistle sounded or any other signal was given. That the plaintiff was going along upon one of the cross streets crossing the defendant's track with his wagon and horses hauling a load of coal when the injury occurred. That by a turn of the defendant's track, and by the obstruction of the view by houses, the plaintiff was prevented from seeing or hearing the train, though he stopped and looked and listened before driving across; that though he drove rapidly across the track, the train, at this rapid speed, came upon him and destroyed his wagon and team and severly injured him, etc. But the defendant's evidence tended to prove that the speed of the train was only four miles an hour, the usual speed, and that the bell was rung from the leaving of the depot to the city limits beyond the place of collision; that the track of the road is straight and open to view for a quarter of a mile, and that any one who either looked or listened must have seen or heard the train; that the plaintiff did not stop but went right on looking in the opposite direction from that from which the train was approaching; that the train was running upon its exact customery time; that plaintiff did not come in sight of the engineer till near the track, and that the train could not be stopped soon enough to prevent the collision.

At the close of the evidence the defendant requested the court to give the following instructions: (here insert) but the court refused to give the same, whereto the defendant at the time excepted, and thereupon, upon the request of the plaintiff, the court gave the following instructions: (here insert.), whereto the defenndant at the time excepted, and thereupon the court, upon its own motion, gave the following instructions: (here insert), whereto the defendant at the time excepted." This, with the closing formula, in all less than three cap pages, would present every question which could be raised upon the instructions as fully as they could be raised by the bill of exceptions of a hundred pages. And so of any error arising upon the trial or in the proceedings, excepting only upon the

overruling of the motion for a new trial based upon the insufficiency of the evidence. The form above indicated is ample in every other imaginable case. A. I.

SLANDER NOT INDICTABLE.

STATE v. WAKEFIELD.

St. Louis Court of Appeals, November, 1879.

Slanderous words, not reduced to writing, constitute no offense against the criminal laws of this State.

Appeal from the St. Louis Court of Criminal Correction.

LEWIS, P. J., delivered the opinion of the court:

This is a criminal prosecution upon information, charging the defendant with having uttered slanderous words against the St. Louis chief of police and a private citizen. The information was demurred to as charging no criminal offense known to the laws of Missouri. The demurrer was sustained, and the city appealed.

No statute of this State forbids the utterance of slanderous words, not written or printed, as a crime to be punished. If the act is criminal under our law, this must be because it was made so by the common law of England, or by some statute or act of parliament made prior to the fourth year of the reign of James the First, which is of a general nature, not local to that kingdom, and which is not repugnant to or inconsistent with our constitutional or statute law. Wag. Stat. 886, §1.

That a written libel may be an indictable offense is not open to question, but we know of no instance in which an oral slander, reflecting on personal character or conduct, has been held to be so in the United States. In England, both before and since the fourth year of the reign of James the First, criminal prosecutions for words spoken have not been unknown. But they furnish neither precedent nor authority for the present case. Most of these arose under the statutes of *scandalum magnatum*, which have always been considered repugnant to and inconsistent with the institutions of this country, and therefore as having no legal influence on this side of the Atlantic. Those statutes made it penal "to speak or to tell any false news, lies or other such false things, of the prelates, dukes, earls and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, stewards of the king's house, the justices of the one bench or the other, and the other great officers of the realm." The spirit of these several enactments originated in the earlier martial character of the British Constitution. Even the tenures were military, and so were the services. Absolute subordination to superiors in estate or condition was considered essential to the welfare and safety of the nation. A consideration of vital importance in the eyes of loyal legislators and judges was that words reflecting on a magistrate in the execution of his office, virtually arraigned the king for the appointment of an unworthy person. But, as in this country we have no prelates, dukes, earls, barons or other nobles, so we have also no "great men," in the sense which pertains to that description of person in the British statutes. Here all are equal before the law. An able law writer says: "In this country no distinction as to persons is recognized, and in practice a person holding a high office is a target at whom any person may let fly his poisonous words. High official position, instead of affording immunity from slanderous and libelous charges, seems rather to be regarded as making his character free for any one who desires to create a sensation by attacking it." Folkard's Starkie on Slander, §144, note 1. The picture may be highly colored, but it is sufficiently truthful to illustrate how generally the British laws on this subject are held to be incompatible with American institutions.

Another subject of criminal procedure under the British system may be found in blasphemous utterances against the Christian religion and its divine objects of worship. There "christianity makes part of the law of the land, on account of its connection with the established church." In People v. Ruggles, 6 Johns. 290, 5 Am. Dec. 335, an indictment for blasphemy was sustained on the general ground that the offense was "a gross violation of decency and good order." Chief Justice Kent held that, "the people of this country profess the general doctrines of christianity, as the rule of their faith and practice;" and that "nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful." It is not material to inquire whether an indictment would be sustained in Missouri upon the same grounds. The case is referred to for the purpose only, of exemplifying the particular kind of oral utterances which have been held to be indictable under the common law and British statutes.

An examination of all the authorities will show that, not even in England, was there ever a criminal prosecution sustained for words spoken, simply because they were defamatory of a private person not within the privileged class. The privilege there enjoyed by magistrates was never extended to inferior ministerial officers, or to those whose official character might be supposed to correspond with that of an American chief of police. In America, where there are no privileged classes, prosecutions for words spoken have been wholly unknown, except where the words, or their tendencies, involved something more than mere personal detraction. Starkie says: "An indictment will not lie for mere words not reduced into writing, unless they be seditious, blasphemous, grossly immoral, or addressed to a magistrate while in the execution of his office, or uttered as a challenge to fight a duel, or with intention to provoke another to send a challenge," Starkie on Slander, § 758. It is not pretended that the information in the present

case brings the words uttered within any of these exceptions. Another high authority says: "Slander is not like libel, an indictable offense. Bailey v. Dean, 5 Barb. 297. Nor is a single precedent of any criminal proceedings from unwritten imputations upon the character of individuals to be found, except in cases of high treason, * * * and it must have been as constituting rather an offense against the government than an injury to the individual, and being therefore seditious, that words reflecting on a magistrate in the immediate execution of his office were for the first time in the reign of Queen Anne held to be indictable. Reg. v. Langley, 2 Ld. Raym. 1060, Holt 644." Townshead on Slander, 3 ed. 66, note 3.

The words charged in the information, in the present case, were purely defamatory of the persons mentioned—accusing them of having formed unlawful combinations for the commission of certain misdemeanors. There was nothing to bring them within any known exception to the general rule that slanderous words not reduced to writing constitute no offense against the criminal laws of this State. The demurrer to the information was properly sustained. All the judges concurring, the judgment is affirmed.

CONSPIRACY TO SLANDER INDICTABLE.

STATE v. HICKLING.

Supreme Court of New Jersey, June Term, 1879.

A conspiracy to slander a person by charging him with a criminal offense is indictable.

Indictment for conspiracy.

The gravamen charged was, that the defendants "fraudulently and unlawfully did conspire and agree between and among themselves, by means of divers false wicked and malicious charges, to injure and defraud him, and to cause him to be regarded as a dishonest man and a thief." The over acts laid, in substance were that the defendants "reported to and among his neighbors that the said Dringer was a thief, and had dishonestly obtained certain brass, copper, etc., from etc,; that they made false affidavits that said Dringer was a dishonest man, and had obtained fraudulently from the Erie company a large amount of copper, brass, etc., and other things fraudulently and in sueh a manner as to make it stealing by said Dringer from said company," etc. The indictment having been brought before this court by *certiorari*, a motion was made to quash it.

BEASLEY, C. J., delivered the opinion of the court:

The principal objection to this indictment that was urged on the argument, is that, taking the pleading at its best, it alleges nothing more than a conspiracy to defame a person by the propagation of a slander; and it was insisted that the wrong thus charged was a civil injury, and not a criminal offense. But the rule of law thus assumed to exist is not only unsupported, so far as has been discovered, by any authority, but is opposed by several direct decisions, and is inconsistent with the general legal theory of the subject. The cases on this head heretofore settled by this court are, with respect to the legal principle underlying them, entirely at variance with the rule here contended for. State v. Donaldson, 3 Vroom, 151; State v. Cole, 10 Vroom, 324. Indeed, it may be said that a combination, formed with a view to cause a person to be suspected of having committed an indictable offense, is much nearer to the original ground upon which, in the old books, criminal prosecutions for conspiracy are based, than were the combinations in either of these reported cases. There are strong indications that originally the definition of conspiracy did not include anything more then confederacies to charge falsely a person with criminality. Thus Lord Coke describes the offense as "a consultation and agreement between two or more, to appeal or indict an innocent person falsely and maliciously, whom accordingly they cause to be indicted or appealed; and afterwards the party is lawfully acquitted by the verdict of twelve men," Blackstone also seems to regard the offense to be confined to a malicious accusation. 4 Black. Com. 136. There are several cases in the Year Books that favor the same limitation. And, in fact, this species of indictment was the remedy for the same wrong, considered in its criminal aspect, for which an action for a malicious prosecution was the remedy, considered in its civil aspect. It is much in this light that the subject is treated in Jacob's Law Dictionary, tit. "Conspiracy," and in Hawk. P. C., b. 1, c. 72, § 2. But the doctrine was soon expanded beyond this limit, and, among other cases, it was held that although no indictment had been found, or even though no complaint had been laid before a magistrate, and the only object appearing was to destroy the reputation of an individual, a prosecution for conspiracy could be maintained. This was the ruling by Lord Mansfield in the case of Rex. v. Parsons, 1 Black. 392, the facts in proof being that the defendants had conspired to take away the character of one Kempe, and accuse him of murder "by pretended conversations and communication with a ghost that conversed by knocking and scratching in a place called Cock Lane." The report of the case does not show that anything was done by the confederates beyond spreading reports defamatory of the person who was the object of their malice.

The present indictment is, I think, in the direct line of the precedents, as it is a slander imputing an indictable offense, the alleged endeavors of the confederates being to bring the prosecutor under the suspicion of having been guilty of theft. Reg. v. Best, Salk. 174; Rex. v Kimberley, 1 Levinz, 62; Reg. v. Best, 2 Ld. Raym. 1167.

In the brief of counsel of defendant, I find the text book of Mr. Gabbett, (1 Crim. Law. 252,) quoted and much relied upon. This author has reviewed this subject with evident care and acuteness, and it seem to me that his conclusions are in direct opposition to those that are necessary to sustain this defence. This is his ultimate deduction

from the authorities: "Conspiracies," such is his language, "to injure or destroy the reputation of others have in several cases been held to be proper subjects of an indictment, and the fair result of these cases appears to be that the mere conspiracy to slander a man will not be sufficient, but there must be combined with it the imputation of a crime, by either the temporal or ecclesiastical courts, or else an intent by means of such false charges to extort money from the party."

From this citation, it seems to me that it is manifest that in the opinion of this ingenious writer, in order to bring a conspiracy to slander a person, *per se*, within the category of indictable offences, the slander designed to be propogated must be of a particular nature—that is, it must include the imputation of an offence punishable either by the temporal or spiritual courts. As the object of the present confederacy was, as laid in the indictment, by means of "false, wicked and malicious charges" to cause the prosecutor to be regarded as a thief, it would seem that the present proceeding, by the test proposed, would be justified. It is true that the counsel of the defendant in his explication of this proposed rule, advances the view that it requires something more to make up an indictable conspiracy than a design to impute an indictable offence, such supposed superaddition being that the charge should be so specific as to jeopard the person slandered, by subjecting him to the risk of a criminal prosecution. But this is an interpolation into the rule of a matter foreign to the text writer just quoted, as well as to the authorities, for it is not perceived that there is any indication to such a purpose in any of the decisions.

With respect to the objections to the mode of laying the overt acts, it suffices to say that they appear to spring out of the false theory that the office of such averments is to show a complete performance of the scheme of the conspirators. The statute does not exact that a full execution of the conspiracy shall be shown, the requirement being merely "that some act in execution of such agreement be done to effect the object thereof." The consequence is, this indictment is not defective in this respect.

The motion to quash must be denied.

LIQUOR LAW — RETROSPECTIVE EFFECT OF LICENSE.

STATE v. WILCOX.

Supreme Court of Indiana, November, 1879.

Where a license to sell intoxicating liquors was issued on the 7th day of March, 1879, covering a period of one year from January 7th, 1879, and the holder of such license was indicted for a sale made on March 1st, 1879: *Held*, that the license, when issued, legalized the prior illegal sale, and defendant could not be punished therefor.

The appellee Wilcox was indicted for unlawfully selling intoxicating liquors without a license so to do, the indictment charging the sale to have been made on the 1st day of March, 1879. On the trial the State admitted that Wilcox had a license to sell intoxicating liquors, which bore date the 7th of January, 1879, and ran for one year from that date, but offered to prove that he did not pay the license fee required until the 7th day of March, 1879, after the grand jury had begun the examination of his case, of which fact he had knowledge, whereupon he paid his license fee and procured his license. On objection to this evidence it was refused and the defendant was acquitted. The State appealed.

HOWK, J., delivered the opinion of the court:

The main question for decision in this case is almost identical with the question which was fully considered and decided by this court in the recent case of Vannoy v. State, 64 Ind. 447. Indeed, this is conceded by the learned counsel for the State in their argument of the case at bar and therefore they have asked us "to limit the scope" of that case, "modify it, or overrule it altogether." In the case cited it appeared that Vannoy had in due form of law obtained an order from the proper board of commissioners, granting him a license to retail intoxicating liquors at a certain place, for and during one year from and after the date of said order upon the payment of the license fee required by the statute, and that he had, on and before the date of said order, strictly and literally complied with all the requirements of the statute, except as to the payment of the license fee; that he had neglected to pay such license fee for more than six months after the date of the order granting such license and had then paid the fee, and then obtained from the proper officer his license of the same date as the date of the order granting it, and for the term of one year from and after said date; and that during the time intervening between the date of said order and the date of the manual delivery of his license, he made the sale upon which the indictment was predicated; and that this indictment had not been found against him, until after his payment of said fee, and his actual possession of the license, which, by its terms, expressly authorized him to make the sale charged in said indictment. It is evident, we think, that there is no material difference between that case and the case at bar, as it would have been if the facts offered by the State had been admitted in evidence.

In the Vannoy case it was held by this court that where a retailer had made a sale without license, and therefore an unlawful sale, he could not be indicted and punished for such sale after he had received a license, which, by its terms, covered the precise time and place, when and where such sale was made, and expressly authorized him to make such sale at such time and place. In other words, it was held that after a sale without license and therefore an illegal sale, the subsequent payment of the license fee and receipt of license, would so far legalize such unlawful sale as to relieve such retailer from the penalties prescribed by the statute in any prosecution for such offense subsequent to the issue of such license.

It seems to us that the doctrine of that case is just and right, and in strict harmony with the pro-

visions of the statutes, while a contrary doctrine might in some instances work injustice and oppression. We are not inclined either to limit the scope of the Vannoy case or to modify it, and certainly not to overrule it, for it still meets the approval of our judgments. The law of this State recognizes the sale by retail of intoxicating liquors as a lawful business, in which good and lawful men may lawfully engage. The business is however of such a nature that the law-making power has seen fit to provide by positive enactment that those persons who may engage therein shall pay a certain sum of money into the county treasury, for a license which will authorize them to pursue the business under certain specified restraints for a certain period of time. The statute regulating the sale of intoxicating liquors has placed the business of selling by retail under the power and control of the different officers of the county prescribing the duties of the several county officers, in connection with the business. The board of county commissioners may grant license to sell by retail intoxicating liquors, upon the applicant's giving bond to the approval of the county auditor, but after this grant the applicant "shall pay the treasurer of said county one hundred dollars, as a license fee for one year, before license shall issue to him." 1 R. S. 1876, p. 871, sec. 5. In section 8 of the statute it is provided that no license "shall be granted for a greater or less time than one year."

It will be seen from these statutory provisions that the fee of $100 pays for one year's license, and that the license can not be granted for a greater or less time than one year. The license is issued as of the date of the grant, and runs for one year from that date. If the county officers receive the applicant's money and give his license two months, as in this case, or six months, as in the Vannoy case, after the date of the license and of the grant thereof, it seems to us he can not thereafter be prosecuted for a sale made after the grant but before the issue of such license as a sale made without license, without doing violence to the plainest principles of right and justice. If the appellee in this case could be indicted and convicted after the 7th. day of March, 1879, for a sale made before that day and after the 7th. day of January, 1879, as a sale made without license, the practical result would be that his license, though nominally issued for one year, would only cover a period of ten months, and the fee paid by him for one year's license and one year's immunity from criminal prosecution for sales without license, would actually afford him such license and immunity for the period of ten months only. Such a result, we think, would be manifestly wrong and unjust, and is not contemplated by any of the provisions of the statute.

In our opinion the facts offered in evidence by the State were immaterial and incompetent, and the court committed no error in excluding them.

We are aware that the conclusion we have reached in this case is not in apparent harmony with the cases of Houser v. State, 18 Ind. 106; Schlict v. State, 31 Ind. 246; and Miles v. State, 33 Ind. 206. These cases were decided when other statutes were in force regulating the sale of intoxicating liquors, but in so far as the questions involved in this case are concerned, these other statutes did not differ substantially from the act now in force on the same subject. To the extent of any actual conflict between our decision in the case at bar and the decisions in the cases cited, the latter are overruled. The appeal of the State in this case is not sustained.

NIBLACK, J.

As the facts agreed upon in this case entitled the appellee to an acquittal, I concur with my associates in holding that the additional evidence offered by the prosecuting attorney was inadmissible, but I do not wish to be understood as agreeing that a party can enjoy the immunity which a license to sell intoxicating liquors affords until he has fully complied with all the conditions entitling him to receive a license, and has actually received his license. See Vannoy v. State, *supra*.

NOTE.—The decision of the court in the case above reported, is not only in conflict with the previous decisions of the same court, as therein cited, but with those of several other States.

The case of Houser v. State, 18 Ind. 106, was a prosecution for selling liquor without a license. The sale was shown to have been made on the 22d of October, 1861, and on the 29th of the same month the defendant paid his license fee and received a license to sell for one year from the 4th day of June, 1861, at which date the county authorities had authorized a license to be issued to him. In answer to the question whether the license shielded him from punishment for the sale so made, the court said: "As the proper steps had been taken by the defendant to procure an order for a license to issue, and such order had been made, we do not think the bare fact of a failure to procure, or of the officer to issue such license, would subject him to prosecutions for making sales, if all he was required to do had been performed. But in this instance all had not been done. The sum that he was required to pay for the privilege of making such sales had not been placed in the treasury, nor are we informed whether he had filed the requisite bond." The case was reversed, however, because of the failure of proof on certain points.

In Schlict v. State, 31 Ind. 246, the court said: "It is the license so issued and not the order of the board granting a license that authorizes the applicant to sell by retail. A license may be authorized by the board and yet not to be taken out, and hence the order of such grant does not of itself prove that a license was issued." Wiles v. State, 33 Ind. 206, was also a prosecution for selling without license. The sale was made in the latter part of December, 1869, while the license was not taken out until January 7th, 1870, though it ran from December 7, 1869, to December 7, 1870, the order of the board granting the license having been made December 7th, 1869. The court say: "The order of the county board is not the license, nor does it alone confer the power to retail. It is but one of the preliminary steps in procuring the license. The order may be made, but the applicant may refuse to pay the fee or execute the bond, without which he is not entitled to the license. It is the license itself, properly procured, that confers the right to retail under the statute, and until it is issued no such right is conferred. It is made a penal offense to sell intoxicating liquors * * * without such license,

it is not in the power of the county board or the auditor to grant a license extending back to a prior date, so as to cover offenses already committed. The license can only take effect from the date it is issued." These decisions would appear to be in harmony with those of other States.

The case of Bolduc v. Randall, 107 Mass. 121, was an action for the price of liquors sold, and it was proved that the seller was not licensed in fact until sometime after the sales were made, which fact under the law of that State would render the sales illegal. The Supreme Court say it is no answer to this that a petition for a license had been filed by the seller before the first sale was made. "The license takes effect from its date. It can not protect sales previously made. Nor does the fact that at the time of these sales no commissioners had been elected from the county of Suffolk render these sales valid. It is the seller's misfortune that he could not comply with the only condition by which the sales could be made legally. By the provisions of the statute all licenses are required to bear date of the day when issued, and expire on the first day of May. And although the seller in this instance paid the fee which is in all cases required, yet we can not from this construe the statute as intending to legalize the sales of the whole year, without regard to the time when the license issued. It must take effect from its date."

The same doctrine is held in State v. Hughes, 24 Mo. 147, where the court say: "The order is not the license; and when the license is obtained and dated it looks forward, not backward. It can have no relation back so as to cover the intermediate space. The order for a license would not protect him if he sold liquors before he thought proper to obtain his license; if so, he would not trouble himself to get a license. But it is the license to sell which gives the seller the protection under the law, and this court can not sanction the doctrine of relation back in such cases. The clerk of the county court very properly dated his license when it was issued; he referred to the previous order of the county court, thereby showing his authority to issue the license—not that the license was to have operation and vitality so long before it was in being." In this case, the order granting the license having been made in July, and the license having issued in October, the defendant contended that it must relate back to the date of the order and cover all the intervening time.

In Edwards v. State, 22 Ark. 253, it appeared that the county court, at its July term, 1860, had granted to the defendant a license to retail liquors for the term of six months from May 13, 1860, and that defendant had retailed between the dates mentioned. In affirming the judgment of conviction the court say: "By retailing without a license the appellant was indictable under the statute; and though jurisdiction is conferred on the county court to grant a license in such cases to operate prospectively, yet it has no jurisdiction or power to make the license operate retrospectively; or, in other words, to cure a past offense or legalize a crime."

In Brown v. State, 27 Texas, 335, the defendant was indicted for selling without a license. The offense was charged to have been committed on the 21st day of August, 1863, and the defendant's license bore date of August 25th, 1863, but covering a term of four months from May 20th, 1863. The Supreme Court, on appeal, held that the license should have been made to take effect from the date of its issuance and not from the time when the county court acted upon the application. "Any other practice," say the court, "would enable the applicant who had taken the preliminary steps in the county court to obtain license, to take the chances of violating the law with impunity, reserving to himself the means of defending himself successfully against a prosecution, if it became apparent that one was about to be instituted." H.

RIPARIAN PROPRIETORS.

PROVIDENCE STEAM-ENGINE CO. v. PROVIDENCE, ETC. STEAMSHIP CO.

Supreme Court of Rhode Island, July, 1879.

A riparian owner platted his land into streets, lots, and a square, and made on the plat a declaration, sealed and acknowledged, that the square, streets and gangways were equally appurtenant to each of the lots, and that the grantees of the lots were equally entitled to use and occupy the square, streets and gangways. When platted one of the streets was below high-water mark. It was subsequently filled out and made, and afterwards closed by B, who had purchased all the lots adjoining this street. A, owning by purchase other lots on the plat, filed a bill in equity against B to compel him to reopen the street. B objected to the bill: 1. That the platted lay out of the street being over tide-water was invalid. 2. That owning all the adjoining lots he was entitled to close the street. *Held*, that neither of these defenses could avail. *Held, further*, that B, holding under conveyances made with reference to the plat, was estopped from denying the validity of the lay out. *Held, further*, that the street being appurtenant to the lots of the complainant, as well as to those of the respondent, and leading to tide-water, the respondent could not deny the complainant's interest in the street.

Bill in equity praying for the removal of an obstruction in an alleged street, and for an injunction.

Charles H. Parkhurst, for complainant. *Thurston, Ripley & Co.*, for respondents.

DURFEE, C. J., delivered the opinion of the court:

This is a bill in equity to abate a nuisance or obstruction to an alleged street or right of way at India Point in the city of Providence. In 1811 the land on India Point belonged to the Fox Point Association, so called, being vested in trustees for the association. In 1815 the harbor line in front of it was established. In 1816 the trustees caused a plat to be made embracing the upland and the land below highwater mark out to the harbor line and dividing the entire tract into lots, squares, streets, and gangways, designating the lots, upwards of one hundred and sixty in number, by letters A to K and by numbers 1 to 153. The trustees inscribed on the plat, under their hand, seals, and acknowledgment, the following declaration, to wit:—"Know all men whom it may concern, that all and singular the within numbered lots are sold and conveyed by us, the undersigned trustees of the Fox Point Association, in manner following, that is to say: All the square, streets, and gangways are equally appurtenant to each and every of said lots, and each and every the grantees of the same are equally entitled to use and occupy said

square, streets, and gangways as such at all times excepting that the grantees of all and singular the water lots, their heirs and assigns forever, shall have the exclusive right to demand and receive wharfage for all the streets and gangways adjoining to their several lots respectively, and each and every the grantees of the water lots, on the west and south sides of said plat, beginning at lot number one and ending at lot number twenty-two, inclusively, their heirs and assigns forever, shall have the sole right to use and occupy the several pieces of land west of the street, adjoining their several lots respectively, for all purposes, excepting that they nor either of them shall not, at any time ever hereafter, have the right to erect any permanent building on said pieces of land or either of them, and the grantees of lot number twenty-two, his heirs and assigns forever, shall have the same right to use and occupy the land south of said lot adjoining said street, subjected to the same restriction as aforesaid." The plat was afterward recorded, and all the lots designated on it were sold from time to time. The lot designated as lot A, and a portion of the lot designated as lot 56, became the property of the complainant, which continues to own them. Lots 13 to 22, inclusive, became the property of the defendants, who continue to own them.

The bill does not expressly allege that the lots were conveyed under and by reference to the plat, nor does it anywhere appear that such was the fact. We infer, however, from the manner in which the case was submitted to us, that it was supposed we would take it for granted that the conveyances were so made, and accordingly we shall do so.

The alleged street or way here in controversy was among the streets or ways designated on the plat. It was, when platted, below high-water mark, and of course existed at that time only on paper. The land over which it was delineated has since then (and after conveyance) been reclaimed from tide-water by filling out the upland. It lies over or along the front of lots 13 to 22, conveyed to the defendants, said lots being situated at the extremity of India Point, on or near the side of the harbor. The defendants have erected a fence across it, thereby obstructing access to and travel over it. The complainant contends that this is an interruption of its right of way and has brought this suit to get the fence removed.

The defendants interpose among other defenses the two following, to wit: *first*, that the street or way was never lawfully created, because at the time of its alleged creation the land over which it was laid was flowed by tide-water; and *second*, that if it was lawfully created, the part of it lying along or over lots from 13 to 22 inclusive, has become extinguished by unity of title or ownership of these lots. The only question now submitted to us is whether these two defenses, or either of them, is valid.

We think the first defense, to wit, that the way or street was never lawfully created, can not be maintained; for though it may be true that the way or street had no actual existance when the conveyances under which it is claimed were made, we think it had nevertheless what may be called a potential or prospective existence, which would become actual whenever the place for it should be filled and incorporated with the upland, and though the conveyances when executed may have been ineffectual to create the way or street, because the site of it was flowed by tide-water, yet we think they were binding by way of estoppel on parties and privies, so that in equity, at least, the said parties and privies could not refuse to allow the way or street as soon as the land designated for it became capable of supporting it. The ground of the estoppel is, that the covenants and servitudes indicated by the plat constitute a part of the considerations for which all conveyances referring to the plat are made, and therefore no person, while claiming under the conveyances, can be permitted to repudiate them or to deny that they exist where they are capable of existing.

In coming to this conclusion we made little account of the harbor line act. The ostensible purpose of that act is not to confer any new right, title, or interest on the riparian proprietor, but only to prevent his encroaching too far on the space required for the harbor. It amounts simply to a license to him to fill out to the harbor line, or to an implied declaration that in filling out to it he will commit no encroachment. To hold that it amounts to more would be doing violence to the act, especially in view of the rule that such acts are to be strictly construed, or are to be construed most liberally in favor of the State. See the decision of the Supreme Court of the United States in Charles River Bridge v. Warren Bridge 11 Pet. 420.

The second defense is, that the way, if lawfully created, has become extinct, the title to the several lots over which it is laid having become vested in the same owner. We do not think the defense can avail. The way is appurtenant to other lots than those over which it is laid, and among them to the lots belonging to the complainant. The way over the lots belonging to the defendants connects with tide-water, and therefore it can not be said that the complainant has no interest in the way because the lots over which it is laid all belong to the defendants; for the complainant may want to use it as a way to tide-water which belongs to everybody.

POTTER, J., concurring:

I concur generally in the result at which the majority of the court has arrived. The facts necessary to the decision of the questions now before us can be stated very briefly.

The trustees of the Fox Point Association, claiming to own certain land and adjoining shore rights and water lots, caused the same to be platted in 1816 in lots for sale and with certain streets laid out thereon. The complainants own lots A and 56 on said plat; the respondents now hold lots 13 to 22 inclusive. The complainants claim that the respondents have without right shut up a certain street upon said plat. It is agreed that said street and all the lots held by the respondents

were at the time under water and were not filled up until 1820, and then by the purchasers of said lots and not by said trustees.

Did said street ever have a lawful existence, and if so, has it become extinguished by unity of possession? It is contended by the respondents that the said platting and conveyance of lots and of any rights in any supposed streets was totally invalid as to that portion of the platted land then under water.

In all questions relating to our shores a very important preliminary consideration is, whether the English common law upon this subject was ever adopted here in its full extent. By the patent of 1643, the laws were to be "comformable to the laws of England so far as the nature and constitution of the place will admit." By the code of 1647, it was voted to "receive and be governed by the laws of England, together with the way of administering of them so far as the nature and constitution of this plantation will permit." The laws of Oleron were adopted, and the recorder was required to keep "the general purchases, which are all we can show for our rights to our lands," and the charter which gave a right to exercise authority. It is well known that our ancestors claimed to hold their lands by purchase from the native proprietors and not by grant from the crown. The charter of 1663 used substantially the same language as the patent of 1643. It is very evident that however as a matter of policy, they may have adopted the usual langauge of charters, they really considered it as a charter of government only, for they had already purchased nearly all the land before, and the remainder they purchased of Ninigret afterwards, and did not claim to hold it of the king.

There is a great difference in the character of the shores of the two countries. And as to the rivers, there are but few rivers in England which would be navigable but for act of parliament, and the repair of their banks and their navigation are regulated by statute. So also in many cases as to marshes. See Ball v. Herbert, 3 Term Rep. 253; and as to Rumney Marsh, see 4 Inst. 276, 277.

To apply the common law doctrine strictly would require us to hold that all the marshes in the State belong to the State: yet from the very first settlement, although flowed by the tide, they have always been recognized as private property, platted and sold as such, taxed as such, and the State has made provisions by statute for exempting them from the fence laws, for the very reason that they are overflowed by the tides. See also as to sedge flats in Connecticut, Church v. Meeker, 34 Conn. 421.

Again it is important to inquire into the nature and extent of the right, formerly of the Crown, now of the State, in the shores. The shore in the common law includes only the space between ordinary high and ordinary low-water mark. The true doctrine seems to be, as the result of the decisions, that the State has the governmental control of the shores and tide-waters for the benefit of the public, in order to protect the public rights of passage or other rights on the shore, and to protect the navigation. Angell on Tide Waters, 27, and cases cited.

It was the policy of the English law, and especially of the feudal system, to consider the king as the original owner of all the lands etc., in the kingdom. Hence he was the owner of all the vacant lands, derelict, etc. All was held of him and escheated to him. So he is spoken of as the owner of the shore. But the king of England held the shores only as trustee for the public. That he had undertaken to grant away portions of the shore as private property, and to exclude the general public from their rights in it, was one of the grievances complained of and attempted to be redressed by Magna Charta. Parliament, according to the theory of the English Constitution, was omnipotent, but the king was not. The king's right of soil was subject to public right, and any grantee of the crown held subject to that. Mayor of Colchester v. Brooke, 7 Q. B. 339, 374; 9 Jur. 1090. Hale distinguishes three sorts of rights in ports and shores: first, the "*jus privatum*," or right of property or franchise, which was always subject to, second, the "*jus publicum*," or public right of passage and navigation; and third, the "*jus regium*," or governmental right, the right of superintendence and control.

It has been very common to speak of the right of the State in the shores as a fee. This is proper only by analogy. To hold that the State owns the shore in fee in the same sense in which it owns a court house or a prison, or in which the United States own public lands, or citizens may own land in fee, would lead to consequences which need only to be considered in order to show that such can never have been the nature of the right. Angell on Tide Waters, 24.

During our revolutionary war and the distressful times which followed it, if the State had owned the fee of this valuable property it could not have escaped a sale. Town treasurers were committed to jail for the non-payment of nearly every State tax that was ordered, and yet no town nor person ever thought of this as a property which the State owned in fee, or could sell to lessen taxation. To hold that the State holds the fee of the shore in such a sense that it can sell the shores would deprive nearly half of the land in this small State of a large portion of its value derived from bounding on the shore. The city of Newport is the owner of Easton's Beach. For the State to sell its shore would take away almost its whole value.

As there is no statute of limitations against the State, especially so far as public rights are concerned, the State would still own large tracts of filled lands in Providence, Newport, and other towns, unless the State had done some act which would justify the courts in holding it to be private. And even if the private title to land so filled should be held good, the State might still sell out a strip of land at the head of any wharf and so cut off the owner from navigation. It might sell off the whole shore so as to cut off the present owners from access to the water. The monstrous injustice that would result if such a doctrine was

established as law, is enough to show that it ought not to be recognized as law.

And such I think is not the meaning of the courts. They have often enough held that the property of the king, and with us of the State, is a trust for the public, a power to control and regulate, to subserve the good of the public, and not a private property. Says Kent, the King in England, and here the State, is trustee for the public; 3 Kent Comm. *427; and the Supreme Court of the United States has on several occasions held the same language. Mayor, etc. of Carlisle v. Graham, 18 W. R. 318; Commonwealth v. City of Roxbury, 9 Gray, 451, 482, 483: Commonwealth v. Alger, 9 Cush. 53, 65: New Orleans v. United States, 10 Pet. 662, 699, 702; Simons v. French, 25 Conn. 346, 352; Church v. Meeker, 34 Conn. 421, 427, 428; Clement v. Burns, 43 N. H. 609, 620. In the last case the court says that the doctrine that the title is exclusively in the sovereign has never been fully received in the American courts. And so in Scotch law. Bell's Principles, §642.

The language of the English decisions to the effect that the king holds as trustee for the public is very strong. Company of Free Fishers v. Gann, 20 C. B. N. S. 1, 115 Eng. Com. Law, 803; Gann v. Free Fishers of Whitstable, 11 H. L. 192; Mayor of Colchester v. Brooke, 7 Q. B. 339. The king's right of soil is "subject to the public right of passage, however acquired, and any grantee of the crown must of course take subject to such right," says Lord Denman in the last cited case, p. 374. Blundell v. Catterall, 5 B. & A. 268, 287, 294, 304-9. Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 H. L. 418. The form of an information by the Attorney General of England is given in Attorney General v. Richard, 2 Anst. 603. It alleges that the shore belongs to the king, and ought to be preserved for the public use, and that the king has the right of superintendency for that purpose. It is true that in arguing the case the attorney general used the usual arguments as to the rights of the crown in the shore.

In Commonwealth v. City of Roxbury, 9 Gray, 451, 482, 483, the court recognizes and approves the rule it had before laid down in Commonwealth v. Alger, 7 Cush. 53, 65, that the title to the flats was in the king, and "that it was so held by him for public uses. This rule, apparently so well settled and established both in England and this country, seems to us not to have been shaken or doubted in any recent English case," &c., &c. The king held the sea-shores as well as the land under the sea; he held the same *publici juris* for the use and benefit of all the subjects for all useful purposes, etc. In Smith v. State of Maryland, 18 How. 71, 74, which was a case of oyster laws, the United States Supreme Court says the right of soil is in the State. "But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights," etc. See also Barney v. Keokuk, 4 Otto, 324; Martin v. Waddell. 16 Pet. 367, 410, 423. "When it is said that the sovereign is the owner of the sea-shore it is meant that the legal title is in him, not for his exclusive use and profit, but in trust for the common benefit of all his subjects," per Thatcher, J., charging the jury in Commonwealth v. Wright; Angell on Tide Waters, 207; 3 Amer. Jurist, 185. And in the great case of Arnold v. Mundy, 6 N. J. (Law,) 1, 71, 77, the court fully discusses the English cases. And it holds that while the title to the common property must be considered as vested in the sovereign, it is to be "held, protected and regulated for the common benefit." The property indeed, strictly speaking, is vested in the sovereign; but it is vested in him "not for his own use, but for the use of the citizens," etc. This case was for an oyster fishery. See Bell v. Gough, 23 N. J. Law, 624. And in Gough v. Bell, 22 N. J. Law, 441, the Supreme Court of New Jersey, by Greene, C. J., lays down the same doctrine that the king held as trustee, and that his grants were subject to all public rights.

The language of many of the decisions can be reconciled by holding that while the State does not own the shore in fee, properly speaking, and therefore can not sell the shore to be held as private property, and so cut off the riparian owner from the water, it has the complete regulation and control of it for public purposes.

In several cases very strong language has been used, to the effect that there can be no private riparian right in tide-flowed land, and that if a railroad cuts off the riparian owner entirely from the water, he has no remedy and no claim to compensation. Most of these decisions, and those going the greatest length, have been made in States peculiarly situated as to railroad corporations. See Gould v. Hudson River R. Co. 6 N. Y. 522; Stevens v. Paterson & Newark R. Co. 20 N. J. Eq. 126; 34 N. J. Law, 532, 544, 566; to the same effect is Tomlin v. Dubuque, Bellevue & Miss. R. Co. 32 Iowa, 106, which relies on the last two cases. Some of these cases have been severely criticised. Cooley Constit. Limit. 544, note 1, remarks of them: "So far as these cases hold it competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appropriation of his property without compensation; for even those courts which hold the fee in the soil under navigable waters to be in the State admit valuable riparian rights in the adjacent proprietor;" and see also 11 Albany Law Journal, 19. And I think the extreme rights claimed for the State by these decisions are in conflict with the general course of decisions in other States and with many cases in New Jersey itself. See, besides those before referred to, Stockham v. Browning, 18 N. J. Eq. 390, where it was held that the riparian owner could not maintain ejectment, but that nevertheless he had an inchoate right in the shore which equity would protect.

Before the decisions in New Jersey in the several cases of Gough v. Bell, it had been the common notion in New Jersey that through the grant from the king to the Duke of York and from him to the first proprietors, the land under tide water and under Raritan Bay had been conveyed, and through them to the riparian owners, and this fact is necessary to the proper understanding of

the cases and opinions. See 3 Kent Comm. *416. And in Bell v. Gough, 23 N. J. Law, 624, 655, Elmer J., commenting on the argument advanced by counsel, that in Martin v. Waddell, 16 Pet. 367, the United States Supreme Court had decided that soil below high-water mark was exclusively in the sovereign, and that the riparian owner had no right in it, said that this was not true. The plaintiff in that case did not claim as riparian owner, but under the proprietors' grant he claimed the land itself under Raritan Bay for an oyster fishery, and the question was whether the Jersey proprietors ever had any title to convey. The United States court held that by their charter they had only the sovereign rights of the crown, which could not be transferred as private property. When the case of Gough v. Bell, 22 N. J. Law, 441, came before the Court of Errors as Bell v. Gough, 23 N. J. Law, 624, in June, 1852, the decision was unanimously confirmed, and some of the judges expressed very strongly the view I have here taken as to the riparian right to wharf out and occupy, and that it was a sort of customary law there. 23 N. J. Law, 678, 685, 688, 695, 702.

In Massachusetts, and Sullivan says in New Plymouth, the ordinance of 1640 extended the riparian rights over the flats. The principles of this ordinance were adopted in New Hampshire, though the ordinance never extended thither. Sullivan on Land Titles in Massachusetts, 284. But it is probable that this ordinance only recognized and validated an existing usage. Sullivan, Land Titles, 285, says: "From the first settlement of the Colony of Massachusetts, that government practiced upon the principles of this provision." And Angell, Tide Waters, 225, says that although the ordinance was afterwards annulled the usage continued, and now has the force of common law, quoting the words of the Supreme Judicial Court in Storer v. Freeman, 6 Mass. 435, 438. And that this common law extended to the sea-shores as well as the coves, etc., was settled in subsequent cases there cited, although the words of the ordinance did not plainly extend to the sea-shore. And see the cases cited by Angell, Tide Waters, 234; *i. e.* Commonwealth v. Charleston, 1 Pick. 180; Commonwealth v. Pierce, 2 Dane's Abridg. 696, recognizing the common practice to wharf out to low water mark, or further if it was not injurious to navigation.

In this State it has always been understood that the riparian owner has the right to wharf or embank against his land, and so make land from tide-water, and this without license, provided he does not interfere with the navigation. It was so stated by Mr. Angell in the first edition of his work on Tide Waters, in 1826, repeated in subsequent editions, and this portion of his work has never been adversely criticised. In very few instances was there any legislating by the State, and notwithstanding the common practice of wharfing and filling, it is belived there has never been an instance of the State interfering to prevent it. There has, indeed, been a good deal of legislation regulating the Long Wharf in Newport.

The State never undertook to regulate this right till 1815, and then did not profess to grant a right, but only to prevent encroachment to save the harbor; and it is noticeable here that the business was first taken up in town meeting, and a committee of five of the most respectable citizens appointed, men old enough to be well acquainted with the usages of our ancestors and the shore rights claimed by them, and who died before most of the present members of the present bar were born. And this committee reported that in their opinion "the rights of individuals have been extended beyond the original intention of the proprietors when the lots were first laid out as appears by plats," etc. And the town proceeded to vote in town meeting that the plat reported by the committee be "established as containing the boundary lines of the harbor aforesaid," and for greater security that application be made to the General Assembly. Up to 1815 we had no harbor act, and for a large portion of the shore have none now. But no Rhode Islander ever thought he was obliged to petition the General Assembly for leave to build a wharf on his own land, and the records of our General Assembly and courts will, we think, be searched in vain for any attempt to interfere with this privilege so generally used. From the very first settlement of the State, our people have claimed and held property in tide-waters. And as I have said, the State regulated the fencing of marsh land in June 1834; the marsh lands of the Woonasquetucket River in October, 1804; and again recognized the ownership in 1861. Pub. Laws, cap. 362. And the Providence purchasers exercised complete control over their thatch lots. In 1773 the Providence purchasers granted to the Baptists several acres in the cove, where the Worcester freight depot now is. They granted to the State a jail lot, covered by salt water (minutes of Judge Staples). If the State owned the tide-flowed land in fee, there was no need of this; nor was there any need when they sold the jail lot to the city, of obtaining a release from the proprietors. See Acts and Resolves of General Assembly of October, 1825, p. 63, October, 1828 p. 70; January 1838, p. 68, Bridgham and Carrington committee; June, 1838, p. 4, George Curtis's committe. And the committee of the proprietors of the grand purchase to convey the lot to the State were James Fenner, Zachariah Allen, and Joseph L. Tillinghast. Some of these men, probably, knew something about the old usages of Rhode Island. The State itself has sold large tracts of land bounding on the sea, confiscated in the Revolution, where probably half the value consisted in its sea frontage. It has received the money and put it into the public treasury, and saved the people from so much taxation, and the owners have ever since been taxed for this additional value. And the fact that from the first settlement of the State, down to 1815, no act was ever passed even to limit and restrain this ancient practice, is significant. The Harbor Act of 1815 does not profess to grant any rights, but only to prevent encroachments by wharves beyond the

established line. The amendatory act of January, 1837, was of the same character. The act of October, 1841, forbade the erection of any wharves in the cove above the bridge, except under the direction of the city authorities.

The right to wharf out or reclaim is a valuable right even before its exercise. It constitutes a part of the value and sometimes nearly the whole value of the upland. In Martin v. Waddell, 16 Pet. 367, 414, Taney, C. J., says: "The men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the New World, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another." In Bowman's Devisees & Burnley v. Wathen, 2 McLean, 376, 382, which was a case on the Ohio river, McLean, J., after holding that the English law as to the navigableness of streams has no application in this country and does not depend on the ebb and flow of the tide, goes on to say: "It is enough to know that the riparian right on the Ohio river extends to the water, and that no supervening right, over any part of this space, can be exercised or maintained without the consent of the proprietor. He has the right of fishery, of ferry, and every other right which is properly appurtenant to the soil. And he holds every one of these rights by as sacred a tenure as he holds the land from which they emanate. The State can not, either directly or indirectly, divest him of any one of these rights, except by a constitutional exercise of the power to appropriate private property for public purposes." In McManus v. Carmichael, 3 Iowa, 1, an action of trespass was brought against the defendant for taking sand from the shore against the plaintiff's land. After a very full discussion the court held it was no trespass, but expressly says that it does not mean to say that the riparian owner does not possess peculiar rights, and that he might not have a remedy by action on the case or by indictment. In Yates v. Milwaukee, 10 Wall. 497, 504, the United States Supreme Court, by Miller, J., held that whether the ownership extends beyond the land or not, this riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it can not be arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested the owner can only be deprived in accordance with established law, and, if necessary that it should be taken for the public good, upon due compensation. And the court refers to Railroad Company v. Shurmeir, 7 Wall. 272, and Dutton v. Strong, 1 Black, 23. In Webber v. Harbor Commissioners, 18 Wall. 57, the court says it recognizes the correctness of the rule as laid down in Yates v. Milwaukee, 10 Wall. 497. In that case the legislature had granted to the city the right to wharf out at the ends of all the streets, and the defendant, who had erected a wharf, was not a riparian owner. And the court make a distinction as to statutes of limitation as concerns the State between lands it holds as private proprietor and lands it holds as sovereign in trust for the public.

In Wisconsin, in Chapman v. Oshkosh & Miss. R. Co. 33 Wis. 629, where the riparian front was cut off by a railroad, the court, by Cole, J., consider the decision in Gould v. Hudson River R. R. Co. 6 N. Y. 522; and in Tomlin v. Dubuque, Bellevue & Miss. R. R. Co. 32 Iowa, 106, unsound; and in Delaplaine v. C. & N. W. R. Co. 42 Wis. 214, they approve and follow their former decision, holding that the riparian owner on a navigable river has rights therein differing in kind and degree from the rights of the public. He has the right of access to and from his land and to all the facilities which the location of the land gives him, and this although the water's edge is the boundary of his title. And they quote and approve the language of the English decision in Lyon v. Fishermongers' Company, L. R. 1 App. Cas. 662. And in Diedrich v. N. W. U. R. R. Co. 42 Wis. 248, 264, the court approve the decision in Chapman v. Oshkosh & Miss. R. R. Co. In Lorman v. Benson, 8 Mich. 18, it is held that the riparian owner is entitled to every right consistent with the public easement; and in Rice v. Ruddiman, 10 Mich. 125, it was held that the riparian owner's title extended into the lake as far as it was susceptible of private use. For this the United States had got an increased price for the land. And it is queried whether the State could cut him off from the water. In Barron & Craig v. Mayor & City Council of Baltimore, 2 Amer. Jurist, 203, it was held that the owner had the right of access to his land by water, and that this was property.

Some of these cases arose on the large rivers and lakes of the West. But the principle must be the same. There is no use of referring to many of the cases where it has been held that no private person has a right to do anything to injure or take away the access of the riparian owner to his land. In Rose v. Groves, 5 M. & G. 613, the plaintiff, who had a house on the bank of a navigable river, recovered for the injury done him by the defendant in placing timber in his front. They have, however, an important bearing as recognizing that a riparian owner has rights, from the very fact of his being such owner, which are valuable, and, if so, constitute a species of property of which no one can legally deprive him, subject, of course, to the public rights of navigation, etc., and to be regulated by the legislature so as to protect them.

By the Thames Conservancy Act of A. D. 1857, the conservators of the Thames might license any riparian owner to make any dock, basin, or embankment in front of his land into the body of the river, with a proviso that it should not abridge or take away any right, franchise etc., etc., to which any owner of lands on the banks of a river is now by law entitled. In Lyon v. Fishermongers' Company, the defendant under license was

embanking in such a way as to cut off a portion of the access which the plaintiff had before enjoyed to his wharf, and he prayed for an injunction. The defendant did not claim a right to interfere with the plaintiff's proper frontage on the river; but from the peculiar shape of the shore he had enjoyed a double frontage,—west as well as south. Malins, V. C., granted an injunction. L. R. 10 Ch. App. 681, n. The case was appealed, and the lords justices reversed his decision. L. R. 10 Ch. App. 679, 687. The justices base their decision on the ground that there was no violation of any private right of the riparian owner distinct from the public right of navigation, and that they could find no authority for holding that on tidal rivers the riparian owner had any rights or easements similar to those which belonged to an owner above the flow of the tide. The House of Lords, L. R. 1 App. Cas. 662 reversed the decision of the lords justices and opinions of considerable length were delivered by Cairns, Lord Chancellor, and Chelmsford and Selborne, ex-Chancellors. They all hold that most explicitly that the right of the riparian owner does not depend merely on the fact that he suffers a particular damage from a public nuisance, but that he has, as in the case of a highway, certain rights distinct from those of the general public, which are valuable and can not be infringed. It is not a right held in common with the rest of the public, for the other members of the public have no access to or from the river at that particular place. It is a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages or restrained by injunction. See also Attorney General v. Conservators of the Thames, 1 Hem. & M. 1, where the same law is laid down by Page-Wood, V. C.

In Baltimore & Ohio R. Co. v. Chase, 43 Md. 23, it was held that the riparian owner on navigable water has the right of access from the front of his lot, and to erect wharves, etc., subject to regulation by the legislature; that these rights are property; and while they must be enjoyed in subjection to the right of the public, the owner can not be deprived of them. So in our sister State of Connecticut, it was laid down by Judge Swift, that while the sea and navigable waters are common for certain purposes, the owners of the bank have a right to the soil covered by water as far as they can occupy, that is, to the channel. It was subsequently explained that this does not mean that the riparian owners are seized, but only that they have a right to occupy, and that it is properly termed a franchise. The usage to wharf out is recognized as an immemoral usage, which makes a common law. It exclusively belongs to the riparian owner, and no one has any right to do anything to his injury in front of his land. 1 Swift's System, cap. 22, p. 341; East Haven v. Hemingway, 7 Conn. 186; Chapman v. Kimball, 9 Conn. 38; Nicholas v. Lewis, 15 Conn. 137; Simons v. French, 25 Conn. 346, 352.

The right to wharf out has also been generally recognized in the other States. See the cases and reasoning in a very able opinion in Clement v. Burns, 43 N. H. 609, 617; and Mr. Justice Dillon, in Northwestern Union Packet Co. v. Atlee, 2 Dillon, 479, 485, says: "Structures of the character just named (that is, wharves and landing places) connected with the shore, when not erected in violation of legislative regulations, when they do not obstruct the paramount right of navigation, and are not nuisances in fact, have the sanction of long usage in this country, and under the qualifications suggested may be lawfully erected; but the right it is said must be understood as terminating at the point of navigability." And in the Scotch law it is held, while the riparian owner's absolute right extends only to high water he has a modified property below it, and that no one can interfere between him and the shore. Bell's Dict. and Digest.

That it may sometimes be a nice question as to when the right of the riparian owner is to be held to conflict with the rights of the public, is no sound reason for denying the right. In the language of Best, J., in Blundell v. Catterall, 5 B. & A. 268, 277, "the law in these, as in all other cases, limits and balances opposing rights, that they may be so enjoyed as that the exercise of one is not injurious to the other." That where land is reclaimed from the tide-water it may be held, at least to a certain extent, as private property, can not well be doubted. Bell v. Gough, 23 N. J. Law, 624.

The next question, and a very important one, is whether the person having the right to wharf out or to fill up can convey this right separate from the upland. If the street can be held as a street by estoppel, there is no reason whatever why the same doctrine should not be applied to the lots then under water. The street is laid out for the lots and not the lots for the street. Unless the lots then under water were to be filled up, the street would have been of little or no value. The right has been recognized in many States without any reference to the principle of estoppel.

The original proprietors of Providence conveyed thatch rights to persons not owners of the upland, as we have stated. In Massachusetts, under their Colony Ordinance of 1640, which as I have before said was probably only designed to recognize and limit an existing usage, the riparian owner had a qualified right to low-water mark, provided it was not more than one hundred rods, and a man might sell these flats separately. Adams v. Frothingham, 3 Mass. 352; Valentine v. Piper, 22 Pick. 85; Mayhew v. Norton, 17 Pick. 357. See also Storer v. Freeman, 6 Mass. 435; Knight v. Wilder, 2 Cush. 199; Dunlap v. Stetson, 4 Mason, 349; Bowman's Devisees & Burnley v. Wathen, 2 McLean, 376, 384, 389; Simons v. French, 25 Conn. 346, 352; Deering v. Long Wharf, 85 Me. 51; Chapman v. Kimball, 9 Conn. 38; Nichols v. Lewis, 15 Conn. 137. So in East Haven v. Hemingway, 7 Conn. 186, 202, the right to wharf out is recognized as of immemorial usage, and it is held that this right of occupation is properly a franchise. So also in Simons v. French, 25 Conn. 346, 352.

As to the doctrine of dedication, it is pretty difficult to understand how anything can be dedicated

which can not be used for the purpose intended. Here the land was under water. But if the water lots were validly conveyed, the right in their owners to fill up the street seems to follow; and the owners of those lots, as well as all the owners of lots on the plat, might well be held to be estoppel from denying it to be a highway.

As to the effect of unity of possession, the argument of the respondents that the purpose of this street was to provide a way for lots 13 to 22 would, it seems to me, from their location on the plat, be entitled to great force but for the language of the instrument attached to the plat, which declares expressly that all the squares, streets, and easements are attached to each lot. Decree accordingly.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF IOWA.

October Term (*Davenport*) 1879.

REAL ESTATE — LIFE OWNER — TAX TITLE.—The devisee of real estate for life can not, by acquiring a tax title thereon, divest the title of the reversioner, it being the duty of such life owner to keep the taxes paid. The fact that the tax title is obtained before the will making the devise for life was admitted to probate will not have the effect to change this rule. Opinion by BECK, C. J.—*Olleman v. Kelgon.*

PROMISSORY NOTE — UNAUTHORIZED INDORSEMENT.—Where a promissory note, payable to one of the defendants, had been indorsed to the plaintiff by the other defendant, in the name of the payee: *Held*, that the indorsements, being unauthorized, conveyed no title to the note, and that plaintiff could not maintain an action thereon against either defendant. Opinion by ADAMS, J.—*Thorpe v. Dickey.*

PROMISSORY NOTE — PLACE OF EXECUTION — USURY.—Where a note purported to have been executed in the State of Missouri, but was delivered and the consideration therefor received in the State of Iowa: *Held*, that it was an Iowa contract, and governed by the laws of this State relating to usury. Opinion by DAY, J.—*Hart v. Wills.*

LIABILITY OF CITY FOR ACTS OF POLICE OFFICERS.—Action to recover damages for an alleged assault upon plaintiff by the deputy city marshal of defendant. The plaintiff alleged that the assault was committed by the officer in arresting him upon a false charge: that it was done under color of authority, and that the act was afterwards ratified by defendant by its prosecuting him upon the charge. *Held*, that the city was not liable for the acts of its police officers, they being not the servants or agents of the city, but of the public, and being only appointed by city authorities as a matter of convenience. Citing Buttrick v. City of Lowell, 1 Allen, 172; Hafford v. City of New Bedford, 16 Gray, 297; Town of Odell v. Shroeder, 58 Ill. 353; Ogg v. City of Lansing, 35 Iowa, 495; Prather v. City of Lexington, 13 B. Mon. 559; Elliott v. City of Philadelphia, 75 Pa. St. 347. Opinion by ADAMS, J.—*Calwell v. City of Boone.*

INSURANCE—CONTRACT—PRINCIPAL AND AGENT.—The plaintiff applied to an agent of defendant for insurance and signed a written application together with a premium note, taking a receipt from the agent, which provided that the note should be returned to plaintiff in case the application was not approved by defendant and a policy of insurance issued thereon. The powers of the agent were limited to receiving applications and forwarding them to the company. He did not forward the application and note of plaintiff, and twenty-five days after they were made a loss occurred. In an action to recover for the loss upon an alleged contract with defendant: *Held*, that the transaction between plaintiff and the agent did not constitute a contract of insurance binding upon defendant. Whether or not the failure of the agent to forward the application and note constituted negligence, for which the defendant would be liable—*quære*. Opinion by BECK, C. J.—*Walker v. Farmers Ins. Co.*

SUPREME COURT OF WISCONSIN.

October, 1879.

AFFIDAVIT FOR CHANGE OF VENUE—PERJURY.—An affidavit merely in the words of the statute (Rev. Stats., sec. 2625), that the party making it "has reason to believe, and does believe, that he can not have a fair trial of the action on account of the prejudice of the judge" (naming him), entitles such party to a change of the place of trial. 2. Whether perjury can be assigned upon such an affidavit, *quære;* but at least an assignment of perjury can not be laid upon traverse of the fact of prejudice. Opinion by RYAN, C. J.—*Bachmann v. State.*

PRESCRIPTION AND LIMITATION.—1. In this State prescription and limitation are substantially alike in their legal effects, both conferring title; and the period of prescription follows that of limitation prescribed by statute. 2. A prescriptive right to flow lands by a mill-dam may be acquired by twenty years' uninterrupted user, and under sec. 26, ch. 138, Rev. Stats. 1858, where the twenty years had expired before the passage of ch. 105 of 1877, it conferred such prescriptive right even as against the State. Opinion by ORTON, J.—*Scheuber v. Held.*

NEGLIGENCE—PRIVITY IN—DEGREES OF CARE.—1. Contributory negligence of the driver of a private conveyance, in which a person is voluntarily riding at the time of receiving an injury from a defective highway, is imputable to the person so injured to prevent a recovery. 2. In an action for injuries caused by negligence, the court, after correctly charging that "slight negligence" (which means in law a want of extraordinary care) would not prevent a recovery, but that a "want of ordinary care" would do so, refused to charge that a "slight want of ordinary care" would have that effect. *Held*, misleading and therefore error. Opinion by ORTON, J.—*Otis v. Town of Janesville.*

BOND—SURETIES — WHAT NOT AFFIRMANCE OF LIABILITY.—In an action on a bond, where the sureties defended on the ground that the instrument was essentially different from that which they promised to execute, and believed themselves to be executing, it was error to admit evidence for the plaintiff that the principal obligor had turned over property to one of said defendants as security against the liability, the taking of such security not being an affirmance by the sureties of their liability on the bond in suit. Opinion by RYAN, C. J.—*Rounsavel v. Wolfe.*

INSURANCE LAWS — CONSTRUCTION OF.— I. It is not the duty of the commissioners of insurance to prosecute insurance companies or their agents for pen-

alties incurred by them under sec. 1974, Rev. Stats. 2. Said sec. 1974 provides that no corporation doing insurance business in this State, against which a final judgment shall have been recorded in any court of this State, shall, after sixty days from the rendition of such judgment, and whilst the same remains unpaid, issue any new policy; and ch. 171 of 1879 requires the commissioner of insurance to revoke the authority of any foreign insurance company to do business in this State, upon its persistent violation of any law regulating such corporation. *Held*, that where, after judgment against a foreign insurance company in a lower court, it has in good faith taken an appeal and given the required undertaking for payment of the judgment if affirmed, it is under no obligation to pay the judgment pending the appeal, and the statutes cited do not apply. Opinion by COLE, C. J.—*State v. Spooner*.

CONVERSION—MEASURE OF DAMAGES.—1. In actions for the tortious taking or conversion of goods, or for breach of contract to deliver goods, unless plaintiff has been deprived of some special use of the property, anticipated by the wrong-doer, or is entitled to exemplary damages, the general measure of damages is the value of the chattels at the time and place of the wrongful taking or conversion, or at which delivery was due, with interest to the time of trial. 2. In case of a wrongful taking or conversion, if defendant has sold the goods, plaintiff may, at his election, recover the amount for which they were sold, with interest from the sale to the trial. 3. If the chattels wrongfully taken or converted are still in defendant's possession at the time of trial, plaintiff may, at his election, recover their present value at the place of the taking or conversion and in the form in which they were when taken or converted. 4. These rules do not apply to cases in which damages are regulated by special statutes. Opinion by TAYLOR, J.—*Ingram v. Rankin*.

RIPARIAN OWNERS—OBSTRUCTIONS—REMEDY.—1. A riparian owner on navigable water, in this State (whether or not the owner of the soil under the water) may construct in front of his land, in shoal water, proper wharves, piers and booms, in aid of navigation, at his peril of obstructing it, far enough to reach actually navigable water; but this right is subordinate to the public use of the water, and may be regulated or prohibited by law. 2. Ch. 45, P. & L. Laws of 1871, amended by ch. 256 of 1873, grants to defendant the exclusive right of constructing booms for holding, storing and assorting logs, etc., for a certain distance up and down the Wisconsin river; but, while it authorizes defendant's works in aid of the boom to extend, in the water, up and down the river, fronting its own lands and those of other riparian owners, excluding all other booms, within the limits specified, it does not attempt to authorize the use by defendant of any part of the bank of the river owned by others; and this could not be done for a private use, nor for a public use without just compensation. 5. The chief navigable value of the Wisconsin river being for the floating of logs to market, booms like that authorized by the statute being necessary for that use, and the statute giving an equal right in the use of defendant's works to all the world, defendant is held to be a *quasi* public corporation, and its franchises to be granted for a public use; and the prohibition of other riparian owners on the same river, within the specified limits from constructing booms therein (a prohibition implied from the exclusive grant to defendant) is a valid exercise of the paramount public right. 4. If defendant's works have been so constructed as to impede the general navigation of the river, in violation of its franchises, a suit in equity by a private person (for an injunction, etc.) is not the proper remedy; and if defendant has so used its works in handling rafts or logs as to give a private right of action, the action must be at law for damages. Opinion by RYAN, C. J.—*Cohn v. Wausau Boom Co.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, October, 1879.]

MECHANIC'S LIEN—CONTRACT BETWEEN OWNER AND CONTRACTOR—PAYMENT TO BE MADE IN LAND—STATEMENT OF OWNER TO SUB-CONTRACTOR.—Appellees filed a bill to enforce a mechanic's lien as sub-contractor for the furnishing of lumber and materials and doing the wood work of the building against the principal contractor and the owners. A decree was entered establishing the lien, from which the defendants appealed. It appeared in evidence that a written contract was entered into between the owner of the premises and the principal contractor for the building of the house, the payments to be made at certain stages of the work, and part of the same to be in land instead of money. The main question for decision in the case is whether the owner at the time the lien notices were served upon him owed the contractor anything on the contract, and if so, whether land or money. It appears that appellees requested Welch (the owner) to inform them of the terms of the contract between him and the contractor, he simply saying to them that he would see them paid. Appellees never heard about a payment for the work in land until after the work was done. DICKEY, J., says: "It is contended by appellees that Welch (the owner) abandoned the provision in his contract, in regard to part payment in Iowa land and availed himself of the privilege of paying in money instead, and, therefore, can not resist the payment of the contract price in money. But in the view we take of the law it is not necessary to discuss the correctness of that position. The statute contains no provision which requires the owner or the original contractor to reveal to a sub-contractor the terms of the contract between the owner and the original contractor. And yet the rights of a sub-contractor to a lien depends upon that contract. It may not be the duty of the owner to inform the sub-contractor of the terms of the original contract, but when called upon by the sub-contractor to do so, he is not at liberty to mislead him as to the correctness of that contract, in so far as it may bear upon the rights of the sub-contractor. The appellees, from the conduct and conversation, had a right to expect payment in money and not in land. The statement of the owner gave them to understand that such was to be the mode of payment, and that a sufficient sum remained unpaid to the original contractor to cover this claim. As between the parties to the original contract a different rule may prevail, but in view of the evidence the owner shall not be heard to say in answer to the claim of the sub-contractor that he does not owe the contractor, or that he owes him land and not money. He is now estopped to deny that upon the faith of which appellees acted." Affirmed.—*Welch v. Sherer*.

MARRIED WOMAN—GUARANTY BINDING SEPARATE ESTATE—REPRESENTATIONS AS TO OWNERSHIP OF PROPERTY.—"Before our recent statutes a married woman in the State of Illinois was incapable of binding herself personally by such a guaranty as is presented in this case. The debt which she undertook to guaranty was not her debt, but that of the firm of Russell & Bradbury. Properly speaking it

was not contracted for her benefit or for the benefit of her estate. As the law then stood, a married woman was capable of charging her separate estate for the benefit of such estate, or for her own personal use, but was incapable of so charging it with the debt of another, with which she had no connection save that of security or guarantor. By the instrument it is declared that she waives all right of dower and homestead in any real estate which then appeared on the record in her name. This clause of the agreement seems to have been made under a misapprehension of the law, and upon the supposition that she was capable of making herself liable personally at law for the breach of such guaranty, and seems to have been intended to expose real estate to which she had a record title to execution for the satisfaction of any judgment which might be recovered at law against her for the breach of the guaranty, but it is shown by the proofs that she had no record title to the land in question. It is charged in the bill that in order to induce appellant to give credit thus to Russell & Bradbury, appellee represented to appellants that she owned a farm in Warren county worth $8,000, given to her by her father, and that she held the deed in her own name. The testimony on that point is conflicting. There is no charge in the bill that such representations alleged to have been made were made fraudulently, or that they were false; nor is it charged or does the evidence show that Mrs. R. at any time represented that she had a record title to this tract of land. The only fraud alleged in the bill is the allegation of fraudulent conspiracy on the part of Mrs. R. and her husband to cheat appellants by keeping her deed or deeds off the record. But there is no proof to support this allegation.'' Decree affirmed. Opinion by DICKEY, J.—*Kohn v. Russell.*

PLEADING—DECLARATION — COMMON COUNTS — PLEA THAT DEFENDANT DID NOT UNDERTAKE AND PROMISE — WHETHER PARTY MAY FILE A JOINT DEMURRER TO PLEAS OF SEVERAL DEFENDANTS.—The declaration in this case is upon two acceptances, is against defendants as partners, and contains also the common counts for goods sold. Defendants pleaded severally. One of them pleaded the general issue with the conclusion to the country. The other defendant pleaded that he did not ''undertake and promise,'' jointly with his co-defendant as alleged in the declaration. To these pleas plaintiffs demurred, and for cause of demurrer allege that defendants have used the words ''undertake and promise'' instead of ''undertake or promise.'' The court sustained the demurrer, and defendants standing by their pleas final judgment was rendered against them. Defendants appealed. SCOTT, J., ''Without discussing the question made whether a party may file a joint demurrer to pleas of several defendants who have severed in pleading it is sufficient for the decision of the present case that the demurrer in any event was improperly sustained. As we have said in Shofeld v. Fidelity Savings Bank, at the present term, the words 'undertake' and 'promise' are equivalent words, and the use of either of them constitutes as effectual traverse of a declaration in the usual form in assumpsit as would the use of both of them. When both words are used as in this case, it is a matter of no consequence whether they are connected by 'and' or 'or.' The meaning in either case is the same.'' Reversed.—*Eastman v. Anthony.*

INSURANCE — SELECTION OF APPRAISERS BY COMPANY ESTOPS THEM FROM DENYING PROPER PROOF OF LOSS — EQUITY PLEADING — EVIDENCE MUST BE RELEVANT TO DEFENSE MADE IN THE ANSWER.—This was a bill in equity by appellee against appellant to rectify a mistake in a policy of insurance on a stock of goods and fixtures and to enforce payment on the policy when rectified for loss. The alleged mistake was in the description of the house in which was the stock of goods. The mistake is denied in the answer. The evidence leaves no reasonable doubt that the mistake was made as alleged in the bill. Appellant also claims that the oral contract for insurance was not made with any agent having authority to act on its behalf, but with a street broker who was solely the agent of appellee, and that when the policy was issued and delivered to appellee, knowledge of the loss which had then occurred was withheld from appellant's agent, and that proper notice of loss was not made. SCHOLFIELD, J., says: ''This position was not admissible under the pleadings. In no part of the answer is the defense now insisted upon set up. It is a familiar rule of equity 'that a defendant is bound to apprise a plaintiff by his answer of the nature of the case he intends to set up (and that, too, in a clear unambiguous manner); and that a defendant can not avail himself of any matter in defense which is not stated in his answer, even though it appears in evidence.' 1 Daniel Chan. Prac. (Perkins ed.) 725-6. Soo, too, we have held where a fact is alleged in a bill and admitted in the answer, the admission is conclusive, and evidence tending to dispute it should not be considered. 27 Ill. 251, 38 Ill. 407; 88 Ill. 254; 81 Ill. 72. But even if it were competent to consider the evidence on this point, we see no objection to the ruling below. The evidence shows that after the proof of the loss was made, appellant and appellee each selected an appraiser, who made an appraisement of the amount due appellee on account of his loss. Where an insurance company sends an agent to adjust loss, it is estopped to subsequently deny that it had proper notice of loss, and it is in the absence of fraud, concluded by the adjustment made by such agent. 50 113; 50 Ill. 120; 82 236.'' Affirmed.—*Marchmann v. Meyer.*

BOOK NOTICES.

THE AMERICAN REPORTS, containiug all Decisions of General Interest, decided in the Court of Last Resort of the several States, with Notes and References. By ISAAC GRANT THOMPSON. Vol. XXVII. Albany: John D. Parsons, Jr. 1879.

The present volume of this series of selected cases contains decisions from twenty-one volumes of reports, and eight States, viz.: Georgia, Kansas, Missouri, New York, Ohio, Pennsylvania, Tennessee and West Virginia. It is a pleasure to turn over the leaves of a volume like this in which at each page the attention is arrested by something new in the field of judicial decision; in which all is new grain and there is no chaff. We have so often expressed our opinion of the value of this publication that we are not called upon to repeat it here. But we would add at this time that we can only hope that the successor to the late Mr. Thompson will be able to keep it to the standard which he attained. This will, of course, be a different task, but one not impossible to perform.

Among the cases of particular interest in this volume, and which we do not remember as having appeared in these columns, the following are worth noting:

A telegraph company can be made responsible for an injury occasioned by the breaking of its poles only by proof of culpable negligence in the construction or maintenance of the line: it is not bound to guard against storms of unusual severity. *Ward v, Atlantic*

etc. Telegraph Co., 71 N. Y. 10. A carrier of animals is subject to the responsibilities of a common carrier, except as to damages caused by the conduct or propensities of the animals. *Mynard v. Syracuse etc. R Co.*, 71 N. Y. 180. Unless expressly authorized by statute, a mechanic's lien can not be enforced against real estate belonging to a municipal corporation and in public use. *Leonard v. City of Brooklyn*. The description in a fire insurance policy of a building insured as a "dwelling house" is not a warranty that it is occupied as a dwelling. *Browning v. Home Ins. Co.*, 71 N. Y. 86. A bank empowered to discount negotiable notes, has power to purchase such notes. *Pape v. Capital Bank*, 20 Kas. 440. A statute provided that "each head of a family or guardian of a family of minor children should be entitled to a homestead." *Held* that the guardian of one minor child was entitled to a homestead. *Rountree v. Dennard*. Taking the property of another without his consent with intent to conceal it until the owner offers a reward for its return, and then obtain the reward, is larcency. *Berry v. State* 31 Ohio St. 219. An assignment of future profits for the benefit of creditors, as where an agricultural society assigned the proceeds of a fair about to to take place on their grounds, is void, as against the lien of an execution issuing before the payment of such proceeds to the creditors. *Huling v. Cabell*, 9 W. Va. 522. A surviving partner appointed receiver of the partnership affairs at his own instance is not entitled to compensation as such receiver. *Berry v. Jones*, 11 Heisk. 206. Notice of dissolution of a partnership was published in a newspaper and a copy thereof, with a red line drawn about the notice, was mailed to a dealer residing in another place. *Held*, that it was not sufficient to charge the dealer with notice. *Haynes v. Carter*, 12 Heisk. 7. A surety on an obligation void for coverture is liable. *Hicks v. Randolph*, 3 Baxt. 352. A bank is liable on a check certified by it whether the drawer had sufficient funds or not, and when the holder procures it to be certified, this operates as payment of the debt for which the check was drawn, and the drawer is released from liability. *French v. Irwin*, 4 Baxt. 401.

Messrs. F. H. Thomas & Co., of this city have just issued an annotated pocket edition of the REVISED STATUTES OF MISSOURI, (1879). It is reprinted from the revised and corrected text of the authorized State edition, and is annotated with reference to decisions of the Supreme Court and Court of Appeals. There has been a considerable delay in the issue of the State edition, very few copies having, so far, been circulated, notwithstanding that the laws therein contained and revised went into force as the statutory law of Missouri on the first day of this month. Under these circumstances this private enterprise is both needful and timely, and will doubtless be appreciated by the bar. The plan of the official revisers has been to throw all the statutes of most general application—such as the codes of civil and criminal procedure, etc., into the first volume, leaving for the second those less likely to to be referred to—special and local statutes, for example. It is the first volume which is here reproduced. The volume contains over 850 pages; has been arranged by Chas. A. Winslow, of the Jefferson City bar, and is sold for $4.00.——Mr. R. Vashon Rogers' LAW OF HOTEL LIFE, has been on our table for some weeks. Treating of the wrongs and rights of host and guest, it is a companion work to the author's previous venture, the Wrongs and Rights of a Traveller. To those who have read Mr. Rogers' first work, it is only necessary to say that the last is equally entertaining and instructive. It is published by Sumner Whitney & Co., of San Francisco——The SOUTHERN LAW REVIEW for October—November is an excellent number. Besides articles on the Taxation of Money and the Reporters and Text writers, it contains a valuable monograph on the Measure of Damages in Actions for Injuries to Passengers in which a critical statement of the principles governing the question is made, and the numerous adjudications set forth. But the most important of its contents is Mr. Hitchcock's able essay on the Inviolability of Telegrams, first read by him before the American Bar Association at Saratoga last year, and printed in full in this magazine for the first time. The subject is one of special interest at present, and the conclusion which the author reaches that the extreme views taken by Mr. Justice Cooley on the one hand, and the committees of Congress which have maintained the absolute and unlimited right of inspection of such documents on the other, are both wrong, the proper doctrine lying in a mean between the two, is presented with learning and force. Mr. Hitchcock's paper is the production of a scholarly and able lawyer, and is a most important contribution to a discussion which is by no means yet closed.

QUERIES AND ANSWERS.

QUERIES.

42. IS A SEAL THAT stamps "Notary Public, Vanderburgh Co., Ind.," a legal seal, or should it also stamp the name of the notary in order to make it legal? R.

ANSWERS.

No. 29.

[9 Cent. L. J. 237.]

The city would undoubtedly be liable the same as an individual stockholder, for the law providing for the organization of railroad companies and for receiving subscription to the stock thereof entered into and formed a part and determined the liability of the city as if it had been written out, and formed in terms a part of the contract of subscription. Hogan v. Cincinnati, etc. R. Co., 17 Ind. 852, Wolfaulk v. State, 10 Ind. 532. The fact that the city possesses limited sovereign power will make no difference, for it is a well recognized rule of law that where a sovereign becomes a member of a corporation, it never exercises its sovereign power. It acts merely as a corporator, and possesses no more power than any other corporator. When it acts like an individual it is bound like an individual. Moore v. Board of Trustees W. E. Canal, 7 Ind. 462. 9 Wheat. 904; 10 Ohio, 476; Henry v. Charleston, 96 U. S. 432. W. E.

NOTES.

In a case in New York the other day, *re Coppers* deceased, the application was made for a peremptory *mandamus* directing the burial of the deceased in a Catholic cemetary where he had purchased a lot and had expressed in his life a desire to be buried. This the trustees had refused to permit on the ground that the deceased was a non-Catholic and a freemason and that by the laws of the association freemasons and non-Catholics were not allowed to be interred therein. The Supreme Court granted the *mandamus* holding that "a party who deals with a corporate body in matters

of contract, and pays his money for property or rights which it assumes to convey without restriction, is not bound to know of articles of faith or private regulations of the corporate body which will make the purchase valueless and the written grant of no avail.'' A contrary doctrine, said the court, ''would unsettle well established principles, and especially that one which declares that a writing is presumed to contain the entire agreement of the parties.'' Mr. Coppers had no other evidence of the title than his receipt for money paid, but the court held this sufficient to pass the property for the purposes contemplated.——In *Wilson v. Church*, 41 L. T. N. S. 57, decided last month. Mr. Justice Brett defined ''fraud'' in these words: ''I must confess to such an abhorrence of fraud in business that I am always unwilling to come to a conclusion that a fraud has been committed: and I have very strong views with regard to what is the legal definition of fraud. Now it seems to me that no recklessness of speculation, however great, and that no extortion, however enormous, is fraud. It seems to me that no man ought to be found guilty of fraud, unless you can say he had a fraudulent mind and an intention to deceive.''——The great case of the City of St Louis v. St. Louis Gas Light Company, which has been in litigation for several years has been decided by the Supreme Court in favor of the city. reversing the circuit court (see 3 Cent. L. J. 72) and the Court of Appeals, 6 Cent. L. J. 332.

Sir Richard Kindersley for many years a Vice-Chancellor of the English Court of Chancery, died on the 22d ult., aged 87. He was born in Madras in 1792, called to the bar in 1816, and appointed Vice-Chancellor in 1861. He soon achieved a very high judicial reputation, as well as from his accurate knowledge of legal and equitable doctrines as from the care and patience with which he applied himself to the investigation of every case which came before him. His judgments (which are reported in Drewry, and Drewry & Smale, and in the first two volumes of the equity series of the Law Reports) are all carefully composed and well reasoned. Among the important cases decided by him may be mentioned Loyd v. Colvin, 7 W. R. 250, 4 Drew, 36, a domicil case in which the delivery of the judgment occupied the whole day.——The English Criminal Statute of 1879 divides boys and girls under sixteen years of age into ''children'' and ''young persons,'' One under twelve is a ''child,'' while if he or she is between twelve and sixteen the word ''young person'' is the proper description.—— The judge of a court in Maine recently sentenced a culprit to twenty-five years in the State prison, The fact was communicated to the prisoner's mother, who was struck at the magnitude of the sentence. ''What did they do that for!'' she exclaimed. ''Twenty-five years! Why, he won't be contented there three weeks!''

The exceptions to the rule of evidence which excludes extraneous and collateral matters are few. Of the class of cases in which they are admitted, the decision of the Common Pleas Division in *Blake v. Albion Life Assurance Society*, 27 W. R. 321, L. R. 4 C. P. D. 94, affords a good illustration. The facts of that case may be shortly stated as follows: The plaintiff sued to recover from the defendants a sum which he had paid as a premium upon a policy effected with them. It appeared that the plaintiff, having seen an advertisement stating that one Howard was prepared to advance money on personal security, applied to him for a loan of £1,500. Howard required the plaintiff to insure his life in the defendants' office, and deposit the policy as security for the loan. The plaintiff accordingly effected a policy, and paid the premium (half of which was shown to have been handed over by the defendants to Howard), but on his requesting Howard to advance the money the latter required the plaintiff to furnish a number of other securities of a stringent character, and on the plaintiff's declining to comply with the requirement, Howard refused to advance any portion of the money. In order to prove that an agreement subsisted between Howard and the defendants for the purpose of defrauding persons in the plaintiff's position, evidence was tendered to show that, in consequence of similar advertisements, a number of other persons been previously induced to insure in the defendants' office: and that in each case the intended borrower had failed to obtain his loan under circumstances precisely similar to those of the plaintiff's case, and had lost the amount paid as premium; and, further, that in these transactions Howard had passed under the various names of Wood, Holland, Seymour, Gard and other aliases. Lord Coleridge, who tried the cause, held that this evidence was admissible, and his ruling was unanimously upheld by the Common Pleas Division. But, though the judges were unanimous in their decision, they differed to some extent in the grounds on which they based it. Mr. Justice Grove said that ''In many cases you can only prove fraud by showing what is behind; the question being one of intention, showing the intention, the motive or the design is the only way of showing the fraud. If this could not be done, fraud could often not be proved in cases where it exists.'' Mr. Justice Lindley thought that the plaintiff might put his case on the fact that the fraud was one of a class having common features. ''If it can be shown,'' he said, ''that the fraud is one of a class having common features, I am of opinion that the evidence of the other frauds is admissible. The sole question is, 'Can you or can you not throw light upon a transaction which may be innocent or not?' The common feature in the present case is the false pretense, and that being so, I think the evidence was clearly admissible.'' If we look at the cases in which, in criminal charges, evidence of other acts may be admitted against the prisoner, we find them falling into three classes: first, where guilty knowledge is a necessary part of the offense, as in a charge of uttering counterfeit coin; secondly, where malicious intent is the essential part of the crime, as in charges of embezzlement, where evidence may be given of previous errors of a similar kind in the accounts kept by the prisoner, in order to negative a defense that the prisoner had made an innocent mistake. R. v. Richardson, 2 F. & F. 343. And, thirdly, in cases where other criminal acts of the prisoner, although in a sense distinct, are really in substance part of the same transaction, as, for instance, in cases of treason and conspiracy to commit a felony. It would seem that the evidence admitted in *Blake v. Albion Assurance Society* might be brought within the reasons on which either the second or third class is founded, and that consequently both the learned judges in the recent case were right. The unlawfulness of the act depended upon the guilty intent, and, as it has been said, ''intention is not capable of positive proof, and it can not be implied from the facts and circumstances which, together with it, constitute the offense, other acts of the defendant from which it can be implied to the satisfaction of the jury must be proved.'' But it might also be said that the repeated requirements to effect a policy as a condition of a loan which was never granted, should be regarded as a series of transactions connected together, as in the third class above mentioned.—*Solicitors Journal.*